Supreme Court, U.S.
FILED

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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET GAYLE HARRIS,

Petitioner,

v.

GENERAL MOTORS POWERTRAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

SOL Z. ROSEN, ESQ.
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23pp

QUESTIONS PRESENTED

1) Whether the panel opinion complied with the decisions of this Court and other Federal Circuits when it concluded that the plaintiff did not experience sufficient sexual harassment and denial of rights under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et. seq.*

2) Whether the decision of the panel on the issue of "adverse employment action" and "retaliation" is in conflict with the decisions of this Court and other Federal Circuits.

PARTIES INVOLVED

The following individual appeared as the plaintiff in the United States District Court for the Eastern District of Virginia and as appellant in the United States Court of Appeals for the Fourth Circuit: Janet Gayle Harris.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES INVOLVED ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

STATUTES INVOLVED 1

STATEMENT OF FACTS 1

REASONS FOR GRANTING THE WRIT 2

I. The Panel Opinion Concluded That the Plaintiff Did Not Suffer Sex Discrimination Is in Conflict with Opinions of this Court and Decisions of Other Circuit Courts of Appeals. 2

II. The Petitioner Suffered Adverse Employment Action When She Was Retaliated Against by the Appellee for Engaging in Protected Employment Conduct. 5

CONCLUSION 7

OPINION BELOW (Appendix A) 1a

STATUTES INVOLVED (Appendix B) 10a

TABLE OF AUTHORITIES

Page

CASES:

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 4

Burlington Industries v. Ellerth, 188 S.Ct. 2257 (1998) . 3, 5

Conley v. Gibson, 355 U.S. 41 (1957) 4

DeVovellis v. Shalala, 124 F.3d 298 (1st Cir. 1997) . . . 4

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) 5

Faragher v. City of Boca Rotan, 118 S.Ct. 2275 (1998) . 3

Harris v. Forklift Systems, 510 U.S. 179 (1993) 2

Hashimoto v. Dalton, 118 F.3d 671, (9th Cir.1997) . . . 5

Knox v. State of Indiana, 93 F.3d 1327 (7th Cir.1997) . 5

Ledergerber v. Stangler et al., 118 F.3d 857 (8th Cir. 1997) 5

Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997), *cert. denied*,118 S.Ct. 336 (1997) 6

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) . 2, 7

Munday v. Waste Management of North America, 126 F.3d, 239 (4th Cir. 1997) 6

Page v. Bolger, 645 F.2d 227 (4th Cir. 1981, *en banc*) *cert. denied*, 454 U.S. 892 (1981) 6

Preda v. Nissho Iwai American Corp., 128 F.3d 789 (2nd Cir. 1997) 6

Table of Authorities (continued)

Pages

Randlett v. Shalala, 118 F.3d 857, (1st Cir. 1997) 5

Robinson v. Shell Oil Co., 117 S.Ct. 843 (1997) 7

Rutan v. Republican Party, 497 U.S. 62 (1990) 7

Smart v. Ball State University, 89 F.3d 437 (7th Cir. 1996) 5

STATUTES:

42 U.S.C. § 2000(e)-2(a)(1) 3

EEOC Interpretive Guidelines Vol. 8 614:0005 6

OPINION BELOW

A panel of the United States Court of Appeals for the Fourth Circuit Issued an opinion on January 11, 1999 affirming the granting of summary judgement to the defendant. A copy of the opinion is reproduced at Appendix A.

JURISDICTION

The decision of the Fourth Circuit Court of Appeals was decided on January 11, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The plaintiff had filed suit pursuant to 42 U.S.C. § 2000(e), *et seq*. As amended, the Civil Rights of 1964,Title VII.

STATEMENT OF FACTS

The petitioner seeks review of the January 11, 1999 judgement of the United States Court of Appeals for the Fourth Circuit which affirmed the granting of summary judgement to the appellee dismissing the petitioner's lawsuit brought pursuant to 42 U.S.C. § 2000(e) *et. seq*., The Civil Rights Act of 1964 as amended. The petitioner bases her appeal in a large measure on the issue of sexual harassment and sex discrimination by the agents of the defendant-appellee corporation that were acting in the scope of their employment and on behalf of their employer. The Court of Appeals disagreed and affirmed the ruling of the District Court for the Eastern District of Virginia dismissing the cause of action.

The Court of Appeals elected to affirm the District Court's ruling that the plaintiff failed to show that she suffered "sufficient" sexual harassment by co-workers of the defendant-appellee corporation. Moreover the Court ruled that the plaintiff did not suffer sufficient "adverse"

employment decisions and retaliation in violation of Title VII of the Civil Rights Act of 1964 as amended. This decision conflicts with the decisions of this Court and other Circuits wherein there are no uniform standards as to the components of "adverse employment" decisions.

On January 11, 1999 the Court of Appeals issued an unpublished *per curium* opinion affirming the District Court's decision to dismiss the case.

REASONS FOR THE GRANTING OF THE WRIT

I. The Panel Opinion Concluded That the Plaintiff Did Not Suffer Sex Discrimination Is in Conflict with Opinions of this Court and Decisions of Other Circuit Courts of Appeals.

The Supreme Court decreed that sex harassment and sex discrimination is protected against by Title VII of Civil Rights Act of 1964 as amended U.S.C. § 2000(e) *et. seq. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In *Vinson, supra* the Court held that a female that is subjected to sex harassment has a viable cause of action against her employer when the terms and conditions of employment are altered or interfered with by an agent of the employer. This was further amplified by *Harris v. Forklift Systems Inc.*, 510 U.S. 179 (1993) wherein this Court noted that the standards to be that the plaintiff need not prove psychological harm in a hostile environment case. The opinion alludes to the fact that the elements of a hostile work environment to be conduct which is severe or pervasive enough to create an environment that a reasonable person could find to be abusive or hostile and is also subjectively perceived by the alleged victim to be abusive. The Court then went on to list several factors that should be considered in ascertaining if there is a hostile work

environment including the fact that is unreasonably interferes with the work performance of the victim.

This Court, during the past term in the cases of *Burlington Industries v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998) further strengthened the rights of a complainant by imposing liability on an employer based upon the conduct of a co-worker or supervisor. While this case does not involve *quid pro quo* sexual harassment, the language of the opinion suggests that there is liability on an employer where there is a hostile work environment caused by co-worker and the situation is not ceased immediately. In the case at hand the petitioner alleged that she was denied terms and conditions of employment in violation of 42 U.S.C. § 2000(e)-2(a)(1). The petitioner is the only female worker in maintenance at the General Motors Powertrain facility located in Fredericksburg Va.

The Court of Appeals failed to consider the totality of circumstances that the petitioner faced at the facility which included sexual harassment, a hostile work environment and the denial of overtime in accordance with the "equalization" provision of the labor-management agreement. When the plaintiff filed a formal grievance with management in accordance with the provisions of the labor-management agreement, she was "excessed from her job classification of "prototype" and reassigned to the maintenance shop. The employer's reasons were the so-called "lack of work" however the records of the employer do not support that position as the work schedule of the employer continued and the high rate of overtime was given to Moats and Knight.

The opinion of the Court of Appeals indicates that a male on her shift was not given overtime, thus defeating the claim of gender discrimination. (*See* opinion of the Court in Appendix A).This reasoning is false as the petitioners claim of gender discrimination is to be considered between herself and Moats and Knight. The Court of Appeals noted that the bulk of overtime was in fact granted to Moats and Knight, thus defeating the Argument of the Court of Appeals. It is the claim of the petitioner that must be considered not that of a no-complaining co-worker.

The Court of Appeals also noted, in a footnote on page 5 of the slip opinion, that the petitioner is barred from raising the issue of the denial of overtime during the temporary transfer back to prototype because it was not raised in her complaint and was first noted in her affidavit in support of the opposition to the motion for summary judgement. That position flies in the face of the decision of this Court in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3 (1984) quoting *Conley v.Gibson,* 355 U.S. 41, 47 (1957). In the case of *DeNovellis v. Shalala*, 124 F.3d 298 (1st Cir. 1997), the Court noted, at page 310 n.6 on this issue, that this view misconstrues the purpose of notice pleading in federal litigation wherein a complaint need not clearly articulate the precise legal theories upon which a plaintiff bases his right to recovery. The complaint must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The Court of Appeals for the Fourth Circuit failed follow this doctrine and failed to consider the position of the appellant in her claim for gender discrimination based upon her allegations in her affidavit in support of the opposition to the motion for summary judgement. Thus, this Court should reverse the opinion of the Court of Appeals with directions to reconsider its ruling based upon the decisions of the Supreme Court .

II. The Petitioner Suffered Adverse Employment Action When She Was Retaliated Against by the Appellee for Engaging in Protected Employment Conduct.

The Court of Appeals failed to consider the recent rulings of the Supreme Court and the decisions of other Circuit Court of Appeals in deciding that the plaintiff did not suffer adverse employment consequences as a result of any alleged retaliatory conduct by the appellee.

In the recent decision of *Ellerth, supra*, the Supreme Court noted, at 118 S.Ct. 2257, 2268, that an adverse employment action constitutes a significant change in employment status. One of the criteria included in the list is reassignment with significantly different responsibilities. This action must be taken by a supervisor, which is applicable to this case. While *Ellerth., supra,* involved *Quid pro quo*, sexual harassment, the same rationale applies to the facts at hand. The attitude of the Fourth Circuit is that "no harm, no foul" is improper and has been rejected by 9th Circuit Court of Appeals in *Hashimoto v. Dalton*, 118 F.3d, 671, 673 (9th Cir. 1997); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, (9th Cir. 1989). In *Hashimoto, supra* the Court ruled that a negative job reference was retaliatory conduct and was an adverse employment decision. In *Hacienda, supra*, the Court noted that pregnancy discrimination was an adverse employment decision, even though the victims were reemployed. In the case of *Smart v. Ball State University*, 89 F.3d, 437, 440-41 (7th Cir. 1996) the Court noted the breadth of the definition of "adverse employment action." *Knox v. State of Indiana*, 93 F.3d 1327, 1335 (7th Cir. 1996). In *Randlett v. Shalala,*118 F.3d 857, (1st Cir. 1997),the Court of Appeals noted that a refusal to transfer was not outside the range of Title VII violations. The 8th Circuit has adopted a more restricted view in *Ledergerber v. Stangler et al.*, 122

F.3d 1142, 1144 (8th Cir. 1997) wherein they noted that a transfer involving only minor changes in working conditions and no reduction in pay or benefits does not constitute an adverse employment action. While the petitioner in the case at hand did not suffer a loss in pay, she did suffer a loss in ***overtime*** pay which adversely affected her job benefits. Thus even by this restrictive standard the plaintiff could still claim that she suffered an adverse employment decision that was retaliatory. The standard of the 4th Circuit is even more restrictive (followed in the case at hand),as noted in *Munday v. Waste Management of North America Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) that there is no adverse employment action without evidence that the terms and conditions or benefits of employment were adversely affected. *Page v. Bolger,* 645 F.2d 227, 233 (4th Cir. 1981) (*en banc*) *cert. denied,* 454 U.S. 892 (1981). The 5th Circuit Court of Appeals, in the case of *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). *cert. denied,* 118 S.Ct. 336 (1997), adopted the 4th Circuit test that focuses on the "ultimate employment decision" not merely on "interlocutory" or "mediate decisions" that has "a mere tangential effect on a possible ultimate employment decision"

On May 26,1998,the EEOC issued new guidelines on retaliation. The EEOC disagreed with the 5th Circuit's holding in *Mattern,* finding that it and similar decisions "unduly restrictive". *See* EEOC Interpretive Guidelines, Vol.8 sec. 614:0005.

The 2nd Circuit Court of Appeals has adopted a reasonable definition of adverse employment decisions by holding that the loss of employee benefits, such for being excluded from department meetings and client outings constituted adverse employment decisions. *Preda v. Nissho Iwai American Corp.*,128 F.3d 789, 791 (2nd Cir. 1997).

A reading of the cases from the several Circuit Courts clearly indicates that there is confusion in the Appellate Courts as to the standards that are to be considered in deciding what sort of conduct constitutes "adverse employment decisions" so as to bring about a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et. seq.* It is essential for this Court to eliminate the split in Circuits and follow its rulings in *Meritor* and *Harris*, *supra*, as well as other decisions of this Court *Robinson v. Shell Oil Company*, 117 S.Ct. 843 (1997) and *Rutan v. Republican Party*, 497 U.S. 62 (1990). This Court should also follow the intent of Congress and the agency designated to enforce Title VII. The EEOC in deciding what constitutes "adverse employment decisions". The restrictive views of some Circuit Courts of Appeals are contrary to the intent of Congress and the interpretation by the EEOC and should be reversed by this Court.

CONCLUSION

When the trial and appellate court restrict the rights of the petitioner to seek relief from sex discrimination and sex harassment by a restrictive view of her rights to be free from adverse retaliatory decisions this Court must grant review and delineate the proper uniform test for an employer's liability for this conduct.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNPUBLISHED

No. 98-1394

JANET GAYLE HARRIS,

Plaintiffs-Appellant,

v.

GENERAL MOTORS POWERTRAIN,
a Division of General Motors Corporation,

Defendant-Appellee.

Appeal from the United States Court
for the Eastern District of Virginia at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-97-880-A)

Submitted: December 9, 1998
Decided: January 11, 1999

Before: WILLIAMS, MICHAEL, and KING, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Sol Z. Rosen, Washington, D.C., for Appellant, Roger L. Gregory, M. Janet Palmer, WILDER & GREGORY, Richmond, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Janet Harris appeals the district court's order dismissing her gender discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e — 2000e-16 (West 1994 & Supp. 1998). For the reasons set forth below, we affirm.

In 1981 Janet Harris began working for the General Motros Powertrain ("GMP") division of General Motors as a production worker, and consequently became a member of the International Union, United Automobile, Aerospace and Agriculture Implement Workers of America (the "Union" or "UAW"). In 1993 General Motors entered into a national agreement with the UAW recognizing the Union as the "exclusive representative of the production and maintenance employees . . . for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment." In 1985 Harris transferred to a skilled trades position in the maintenance department, and in September 1995 began working in the prototype division of the maintenance department ("prototype"). At the time she was the only woman in prototype and the only female employee of her job classification in the maintenance department.

In October 1995 Harris filed a grievance with her Union based on the disparity in the amount of overtime hours available between the first and second shifts in prototype. Thereafter, a series of incidents occurred that gave rise to this lawsuit. Specifically, fellow prototype

worker, Mark Moats would frequently change the password on a work computer without informing Harris. Harris' consequent inability to access this computer interfered with her job performance, and her complaints to supervisor Royden Grove and personnel director Kevin Smith failed to remedy the situation. In November or December 1995, Harris found a sheet of paper on a bulletin board in the computer room that said "PMS," and something to the effect of, "are you suffering from PMS, there is help at your local psychiatrist." She understood the letters PMS to stand for premenstrual syndrome. The sign remained on the bulletin board for approximately one week. Around this same time a coworker left various buttons in the computer room that had messages such as: "Too bad ignorance isn't painful," and "The difference between genius and stupidity is that EVEN genius has its limits."

On January 18, 1996, Moats changed the computer password to "PMS." Harris immediately complained to general foreman Bruce Wheeler. On January 23rd, GMP made the decision to transfer Harris from prototype back to the maintenance shop. On January 23rd or 24th Harris and a union representative met with Grove to complain about the password and the overall hostile working environment in the prototype work area. On January 26th the offensive password was removed. On January 28, 1996, Harris transferred from prototype.

In February and early March 1996, the UAW filed a series of grievances on Harris' behalf challenging her transfer from prototype and alleging sexual harassment and a hostile work environment. In February 1997, UAW and GMP reached a settlement resolving Harris' overtime grievances. The settlement agreement awarded Harris 140 hours pay amounting to approximately $2900, and

recognized that GMP had not discriminated against Harris. Harris appealed the settlement, and in June 1997 filed this Title VII action.

We review an award of summary judgment de novo. *See Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Although summary judgment disposition should be used sparingly in employment discrimination cases, it is appropriate when there is no genuine dispute of material fact. *See Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1004-05 (4th Cir. 1987).

Initially, we agree with Harris that the settlement between the UAW and GMP addressing her claims of overtime disparity does not foreclose her from reasserting the claims in this action. This court is bound to enforce any legally negotiated arbitration clause that obligates parties to submit claims under Title VII to arbitration. *See Brown v. T.W.A.*, 127 F.3d 337, 340 (4th Cir. 1997). This rule applies to the arbitration provisions of a collective bargaining agreement. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 885 (4th Cir. 1996). However, an employee's contractual rights under a collective bargaining agreement are distinct from an employee's statutory Title VII rights. *See Brown*, 127 F.3d at 340; *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974). Therefore, even if a collective bargaining agreement dictates arbitration as the exclusive remedy to resolve claims that the contract has been applied unfairly on the basis of a protected statutory classification, an employee may still bring an independent Title VII action

based on the same facts if the collective bargaining agreement does not provide for arbitration as the exclusive remedy to resolve an employee's statutory Title VII rights. *See Alexander*, 425 U.S. at 53-54; *see also Brown*, 127 F.3d at 341-42. Moreover, a union-negotiated waiver of the right to pursue statutory claims in a federal forum must be "particularly clear." *Wright v. Universal Maritime Serv. Corp.*, 119 S.Ct. 391 (1998).

Although the labor agreement at issue in this case prohibits conduct similar to that protected by Title VII, it states only that "the provisions of this Agreement" will be applied without discrimination based on sex. The agreement does not purport to submit any noncontract-based dispute or any statutory dispute to arbitration. *Brown*, 127 F.3d at 341. In addition, the agreement states that "[t]he grievance and arbitration procedure shall be the exclusive contractual procedure for remedying such discrimination claims." This language further suggests that the agreement does not bar an employee from bringing and action in federal court to enforce the full scope of her statutory rights. Accordingly, Harris' Title VII claims were properly before the district court.

Harris asserts that GMP denied her overtime when she worked in prototype from September 1995 through January 1996 and that as a result of her transfer from prototype and a job restructuring that occurred in June 1996 she was further denied overtime opportunities. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-04 (1973), the Supreme Court established the familiar "order and allocation of proof" for Title VII cases in which the plaintiff alleges disparate treatment. First, the plaintiff must establish a prima facie case of discrimination. *Id.* at 802. To establish a prima facie case, Harris must demonstrate the (1) she

belongs to a protected class; (2) she was qualified for her job; (3) she suffered an adverse employment action; (4) she was treated differently from similarly situated employees. *Id.* Once a prima facie case is presented, the defendant must then articulate some legitimate nondiscriminatory explanation reason for the disparate treatment. *Id.* The articulated nondiscriminatory explanation is "presumptively valid," and the plaintiff must then demonstrate that the explanation is pretextual and "meet the ultimate burden of proving intentional discrimination" by a preponderance of the evidence. *Moore v. City of Charlotte*, 754 F.2d 1100, 1106 (4th Cir. 1985). The burden of proof never shifts from the plaintiff in a Title VII case. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993).

We find that Harris failed to carry her ultimate burden of proving that gender discrimination played a role in GMP's decisions affecting overtime. Harris offers no evidence other than the "PMS" password incident and the "PMS" sign in support of her claims that any denial of overtime was gender based. It is undisputed that GMP awarded Moats and Knight more overtime opportunities than Harris from September 1995 through January 1996. During this period, however, Harris' fellow second-shift worker Phil Morton was also denied overtime, thereby calling into question Harris' assertion that the decision to give the first shift more overtime was gender based. In addition, GMP put forth unrefuted business reasons documenting the impracticability of equalizing the amount of overtime between shifts within the prototype equalization group. Finally, the record contains no evidence other than Harris' bare assertion that the June 1996 restructuring, which presumably affected no only Harris but her fellow

prototype coworkers, was motivated by an intent to discriminate against Harris because she was a woman.*

Unfortunately for Harris, although the record suggests that GMP made efforts to satisfy Moats' and Knight's requests for more overtime, it is devoid of evidence showing Harris' gender was a factor affecting GMP's personnel actions. The two sexually offensive incidents Harris cites in support of her claim that gender discrimination played a role in GMP's award of overtime opportunities do not enable Harris to meet her ultimate burden of proving intentional discrimination in violation of Title VII.

Harris next claims that her transfer from prototype was in retaliation for her complaints about sexual harassment and a hostile work environment. To establish a prima facie case of retaliation Harris must show: (1) that she engaged in protected activity or opposed a practice made unlawful by Title VII, (2) that the employer took adverse employment actions against her, and (3) that there was a causal connection between the protected activity and the adverse action. *See Ross Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some

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* In her brief Harris alleges she was unfairly denied overtime during her temporary transfer back to prototype in March 1996. However, this incident was not cited in Harris' complaint and first appeared in her affidavit accompanying her opposition motion to Defendant's motion for summary judgment. The record contains no evidence surrounding the details of this allegation, and Harris failed to allege in her affidavit that the lack of overtime available to her during this period was a product of gender discrimination. Therefore, this claim cannot withstand Defendant's motion for summary judgment.

tangential effect upon those ultimate decisions. *See Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc). The alleged adverse employment actions must be a "material [ ] adverse change in the terms and conditions of employment [and] must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993).

Harris' placement in prototype merely constituted a new job assignment, and she did not sustain a demotion or pay cut as a result of her transfer back to the maintenance department. Therefore, we find that Harris' transfer did not give rise to the level of adverse employment actions made actionable under Title VII.

Sexual harassment which creates a hostile work environment is actionable under Title VII because it amounts to discrimination in the conditions of employment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-68 (1986). To establish her hostile work environment claim, Harris must prove that: (1) the conduct is question was unwelcome; (2) the harassment was based on sex; (3) the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) there is some basis for imposing liability on the employer. *See Swentek v. USAir, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987). Harassment is actionable only if it is so severe or pervasive so as to "alter the conditions of [the victim's] employment and create an abusive working environment." *Vinson*, 477 U.S. at 67 (internal quotation marks omitted) (alteration in original). In order to determine whether sexually offensive conduct was sufficiently severe of pervasive to bring it within Title VII's purview, we examine the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically

threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 22.

The conduct Harris cites in support of her hostile work environment claim is the placement in the computer room of various buttons and a makeshift sign with the words "PMS," and the alteration of the computer password to "PMS." Both the sign and the password remained for approximately one week. The buttons had no sexual connotations, and until the other incidents, Harris did not even believe that they were directed at her. Although these events offended Harris and delayed her ability to perform certain job functions, we agree with the district court that they were not severe or pervasive enough to state a viable claim under Title VII.

We therefore affirm the district court's order granting Defendants summary judgment on Harris' Title VII claims and deny her motion for summary reversal or remand. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

42 U.S.C. 2000e-2(a)(1)

It shall be an unlawful business practice for an employer

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms and conditions or privileges of employment because of such individual's race, color, religion, sex or national origin;

(2)

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Supreme Court of the United States

OCTOBER TERM, 1998

JANET GAYLE HARRIS,

Petitioner,

v.

GENERAL MOTORS POWERTRAIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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1888

STATEMENT PURSUANT TO RULE 29.6

General Motors Corporation advises the Court that the following is a list of GM's nonwholly owned subsidiaries.

Asset Leasing GMbH
Carcus Grundstrucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.

Beijing Wabyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator, Co, Ltd.
Saginaw Norinco Lingyun Drive Shaft Co. Ltd.
Zhejiang Delphi Asia-Poacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
A. Procedural Background	1
B. Statement of Facts	2
Reasons for Denying the Writ	6
I. The Fourth Circuit's Decision Applied Settled Law In Ruling There Was No Credible Evidence That The Incidents Complained Of Were So Severe Or Pervasive To Create A Hostile Environment?	6
II. There Is No Evidence That The Employer Transferred The Petitioner In Retaliation For Her Complaints Of Gender Discrimination	10
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Baldwin County Welcome Center v. Brown, 466 U.S. 147 12

Burlington Industries v. Ellerth, 118 S. Ct. 2257 (1998) 8, 9

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) 11

Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998) 8, 9

Koelsch v. Beltone Electronics Corp., 6 F.3d 705 (7th Cir. 1995). 10

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 10

Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) 6

Weiss v. Coca-Cola Bottling Co., 990 F.2d 333 (7th Cir. 1993) 7

Cited Authorities

Page

Statutes:

28 U.S.C. § 1343 1

42 U.S.C. § 2000(e) 1

STATEMENT OF THE CASE

A. Procedural Background

On June 6, 1997, Petitioner filed a Complaint in the United States District Court for the Eastern District of Virginia. Petitioner alleged that General Motors Powertrain (hereinafter referred to as "GM Powertrain"), a division of General Motors Corporation, violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), and 28 U.S.C. § 1343. Specifically Petitioner alleged that she was subjected to sexually offensive words, denied overtime and was transferred in retaliation for her complaints about overtime and harassment.

On February 2, 1998 GM Powertrain filed a motion for summary judgment on the basis that the petitioner could not prove either quid pro quo or hostile work environment sexual harassment; that her claim that the employer failed to equalize overtime was a contractual dispute that was settled and therefore barred under the doctrine of accord and satisfaction; and that there was no factual support for her claim that she was transferred from the prototype group in retaliation for her complaints.

On February 20, 1998, Judge Albert V. Bryan issued an order granting GM Powertrain's motion for summary judgment and dismissed Petitioner's case. Judge Bryan relied on the reasons stated from the bench at the hearing on the same date. (J.A. 355, 356). The petitioner filed an appeal with the United States Court of Appeals for the Fourth Circuit on or about March 18, 1998. A panel of the Court of Appeals affirmed the decision of the District Court in an unpublished opinion decided on January 11, 1999.

Petitioner filed this petition for certiorari on March 29, 1999. For the reasons stated below the GM Powertrain files this brief in opposition to the petition for certiorari.

B. Statement Of Facts

In 1995 GM Powertrain anticipated a need for more prototype torque converter clutches and as result created a new position known as prototype tool and die inspector (also known as the prototype tool and die employee). *See* "Prototype Tool Inspector Selection Process". (J.A. 197). Prototype is the department that develops new designs for future models. Harris Dep. at p. 25. (J.A. 31). Before the prototype tool and die inspection department was created, Mark Moats ("Moats") and Kenny Knight ("Knight") were shop tool and die makers who performed the prototype tool and die duties. GM Powertrain posted openings for two additional prototype tool and die makers due to the increased volume of work. Harris Dep. at p. 25. (J.A. 33). Harris and another tool and die employee, Phil Morton ("Morton"), were the only two tool and die workers who applied for these additional "prototype" positions. Petitioner and Morton transferred to the prototype department in June or July, 1995. Harris Dep. at p. 25, 27. Royden Grove ("Grove") was the supervisor for the prototype department. Harris Dep. at pp. 28, 29. (J.A. 34, 35).

Two computers, the Mistral and the Swift, were used at the plant. Although these computers were not assigned to anyone, Moats generally used the Mistral computer and Knight used the Swift computer. Harris Dep. at p. 29, 30. (J.A. 35, 36). Petitioner normally used the Mistral computer but she had access to and used both. Passwords were used

to limit access to the computer to authorized persons. Moats changed the password on the Mistral computer periodically. Harris Dep. at p. 30. (J.A. 36). If Petitioner or anyone using the computer did not know the password she or he could not access the computer to run programs. Harris Dep. at p. 31. (J.A. 37). Petitioner performed other duties when she did not have the password for the Mistral and if the program she needed was not on the Swift. Harris Dep. at p. 30, 31. (J.A. 19, 22, 24).

Moats began changing the passwords for the Mistral computer in October, 1995. Harris Dep. at p. 33, 34. (J.A. 39, 40). In her deposition Petitioner stated that she informed the personnel director, Kevin Smith ("Smith") that Moats changed the password without telling her of the new password. Harris Dep. at p. 38. (J.A. 44). Petitioner felt that this was a "little power game" with Moats. But she did not think it was sexual harassment. Harris Dep. at p. 8. (J.A. 133).

Petitioner stated that the letters "PMS" appeared on a sign on the bulletin board in the computer room. Petitioner described the sign as saying "PMS", followed by "are you suffering from PMS. There is help at your local psychiatrist." Harris Dep. at p. 39. (J.A. 45). Someone hand-penciled or wrote in the words "prototype machinist syndrome." Harris Dep. at p. 41. (J.A. 47). Petitioner never complained about the sign. Harris Dep. at p. 44. (J.A. 50). In fact Petitioner did not think the sign was sexual harassment. Harris Dep. at p. 8. (J.A. 133). One to two weeks after the sign appeared on the bulletin board the password to the Mistral computer was changed to "PMS." Harris Dep. at p. 40, 47. (J.A. 46, 53).

Petitioner reported her complaints about the "PMS" password in a February 8, 1996, typewritten memorandum to Smith. *See* Harris' February 8, 1996 Memo to Kevin Smith. (J.A. 198). In that memo Petitioner wrote that January 18, 1996 was the first time "PMS" was used as the password. Petitioner further documented that she did not advise Grove that the password was "PMS" until January 23rd or 24th. Grove stated that he immediately directed Moats to remove the password. Grove Dep. at p. 9. (J.A. 158). By Petitioner's own account the password was removed from the computer by January 26th. Harris February 8, 1996 Memo to Kevin Smith. (J.A. 198).

Petitioner observed buttons in the room where she and other prototype employees worked. There were slogans on the buttons that read "its too bad stupidity isn't painful" and "the difference between genius and stupidity is that even genius has its limits." Harris Dep. at p. 51. (J.A. 56-A).

When General Motors Powertrain determined that the prototype torque clutch converters would not reach its production forecast, management decided to transfer one prototype tool and die employee to the shop. (J.A. 222). The General Motors Powertrain and the International Union, United Automobile, Aerospace and Agricultural Workers' of America (the "Union") agreed that there were too many tool inspectors in prototype and not enough in the shop. Grove Dep. at p. 20. (J.A. 169). In an effort to resolve this problem GM Powertrain transferred a prototype employee to the shop tool and die department.

Grove requested the transfer based upon his manpower needs. (J.A. 220). He stated in his affidavit the decision to excess Petitioner was based upon the actual production of

prototype converter clutches being lower than anticipated. This resulted in the need to reduce the number of prototype inspectors. Grove completed the manpower needs request form on January 23, 1996. Petitioner acknowledged that because she had lowest seniority she would rightfully be the first to be transferred. Harris Dep. at pp. 61-63 (J.A. 62-64); Harris Dep. at pp. 29, 30 (J.A. 35, 36). Harris was transferred to the shop tool and die department on January 29, 1996. Petitioner did not experience any change in her classification or wage rate. Affidavit of Royden P. Grove, Jr. (J.A. 222).

Petitioner filed several grievances with the Union. Some of the grievances were for disparity in overtime. Petitioner alleged that Moats and Knight received a disproportionate amount of overtime. Yet there is no evidence that her overtime was limited by being transferred back to the shop. Petitioner acknowledged that she could have transferred to the shop during the summer of 1996. (J.A. 146). She also admits that more overtime was available if she worked in the shop. (J.A. 82).

The grievances were processed through the grievance procedure. The Union and GM Powertrain resolved Petitioner's grievances. GM Powertrain paid Petitioner for 140 hours at an hourly rate of $22.00 an hour. The company paid to resolve all of her grievances. Grievance Settlement Statement (J.A. 215); Hourly Payroll Check Registrar (J.A. 216); and Plaintiff's Responses to Request for Admissions, Nos. 3 and 4. (J.A. 217).

Petitioner then filed this lawsuit on or about June 6, 1997, seeking the restoration of all sums due to her as a result of the deprivation of her right to receive overtime, an injunction against further acts of retaliation and gender discrimination, compensable and punitive damages, and reasonable attorney fees, costs and interest.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT'S DECISION APPLIED SETTLED LAW IN RULING THERE WAS NO CREDIBLE EVIDENCE THAT THE INCIDENTS COMPLAINED OF WERE SO SEVERE OR PERVASIVE TO CREATE A HOSTILE ENVIRONMENT?

There is no reason for this Court's review of the Fourth Circuit's fact-based determinations, which rests on legal principles previously announced by this Court, and which reflects no disagreement with the law recognized in any other circuits, which were rejected by the district court and by a panel of the Fourth Circuit. Petitioner could not established sufficient evidence that she was subjected to a hostile work environment nor a basis for imputing liability to GM Powertrain for the acts of which she complained.

Petitioner contends that the Fourth Circuit's failure to conclude that the plaintiff was subjected to gender discrimination was in conflict with this Court's decisions and decisions of other circuits. It is well settled that the elements of a *prima facie* case for hostile work environment claim are: (1) that the conduct in question was unwelcome; (2) the harassment was based on sex; (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer. *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (en banc).

As a matter of law, the alleged conduct that the Petitioner complained of was not so "severe" or "pervasive" as to meet the requirements of the third element of the standard. Contrary to what Petitioner contends, the elements of a *prima facie* case are consistent throughout the various circuits. For example the Seventh Circuit addressed the third prong of the standard in *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993). In the *Weiss* case, plaintiff's supervisor called her "a dumb blonde," asked her for dates, put his hand on her shoulder several times, placed 'I love you' signs in her work areas, and attempted to kiss her several times. The Seventh Circuit held that these actions did not meet the standard for actionable sexual harassment and found find that Weiss had not met her burden of proving a hostile environment. There is no question that the comments and offensive touching that Weiss was subjected to were more severe than the single "PMS" password incident that Petitioner described. Clearly, Petitioner's facts, even given the most favorable inference, lack legal sufficiency to establish a hostile work environment.

Petitioner cannot even meet the burden of proving a hostile work environment because the action she described was not so severe or pervasive as to create an abusive working environment. Harris admitted that she performed other duties when she did not have the password for the Mistral computer. She could use the other computer for some of her work. (Exhibit 1, Harris dep. at p. 30, 31). She characterized the changing of the password was a "little power play." There were no allegations of touching, sexual insults or lewd pictures. Petitioner testified that she did not find the sign with the word "PMS" on it to be offensive. Moreover the word was removed as a password within two or three days after the employer became aware of it.

The buttons with the slogans that said "its too bad stupidity isn't painful" and "the difference between genius and stupidity is that even genius has its limits" were placed in an area used by other prototype employees. In fact, Petitioner did not believe that the buttons were directed at her until after "PMS" became a password. Furthermore, although the buttons were distasteful, they contained no gender or sexual connotations.

An employer may defend its liability to an employee subjected to a hostile work environment by addressing the two necessary elements. The two elements are: (a) that the employer exercise reasonable care to prevent and correct any sexually harassing behavior; and (b) that the plaintiff failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth*, at 2261. The record is clear that Petitioner did not complain of the "PMS" password until January 23rd or 24th and at that time her supervisor immediately instructed Moats to remove the password. By Petitioner's own account, the password was removed from the computer by January 26th. Therefore the petitioner cannot prove the first element which is that the employer failed to exercise reasonable care to prevent and correct any sexually harassing behavior.

Petitioner likewise could not meet her burden of showing that some basis exist for imputing liability to GM Powertrain. Petitioner's mistaken view that the Circuits have varying standards for a hostile work environment claim leads her to the erroneous conclusion that *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) support her position. These cases can be distinguished from Petitioner's

case. Both of the plaintiffs in *Ellerth* and *Faragher* were subjected to sexual harassment by a supervisor. The one offensive act that Petitioner described was the use of "PMS" as a password. The person who placed this word in the computer as a password was a co-worker, not a supervisor. Petitioner misquotes the Court when she states that there is "liability on an employer where there is a hostile work environment caused by a co-worker." In *Faragher,* 118 S. Ct. at 2278, 2279, this Court stated

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

In both cases the employer was held liable only when a supervisor with authority over the employee created the hostile working environment. Even accepting Petitioner's contention that the behavior that the Petitioner was subjected to met the elements of a *prima facie* case, the offensive act was done by a co-worker, a fellow tool and die inspector. who did not have or exercise any authority to hire, fire, transfer employees, assign overtime or otherwise exert control over any management duties.

II.

THERE IS NO EVIDENCE THAT THE EMPLOYER TRANSFERRED THE PETITIONER IN RETALIATION FOR HER COMPLAINTS OF GENDER DISCRIMINATION

Petitioner contends that her transfer to shop tool and die constitutes an adverse employment decision and was done in retaliation for her complaint of sexual harassment. To prevail on a claim of retaliation, a plaintiff must either offer direct evidence of discrimination, or proceed under the burden shifting method set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas* the plaintiff must first prove, by a preponderance of the evidence, a *prima facie* case of retaliation. The burden then shifts to the employer to provide a nonretaliatory explanation for its actions. Once the employer has offered a neutral reason for its actions, the burden shifts back to the employee to demonstrate that the employer's stated reason is merely a pretext for covering up discriminatory conduct.

A plaintiff proceeding under the McDonnell Douglas burden-shifting method must first establish a *prima facie* case of retaliation. Only then does the burden shift to the defendant to provide a nonretaliatory explanation. A *prima facie* case of retaliation is established when the plaintiff shows that: (1) she engaged in a protected activity under Title VII; (2) she suffered an adverse employment action subsequent to her participation; and (3) there is a causal connection between the adverse employment action and her participation in protected activity. *Koelsch v. Beltone Electronics Corp.*, 6 F.3d 705, 708 (7th Cir. 1995). Clearly

Petitioner was engaged in protected activity when she complained to Grove, her supervisor, about the "PMS" password. She could not, however, establish the other elements. First, Petitioner did not suffer a loss of pay or status upon returning to shop tool and die.

Petitioner presented no evidence that her overtime was limited to being transferred back to the shop. In fact Petitioner admitted that she could have transferred back to the shop during the summer of 1996 where more overtime was available.

The Petitioner's reliance on *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) is inappropriate. Unlike the plaintiff's in *Hacienda Hotel*, there is no factual evidence in this case to support Petitioner's claim for retaliation. In *Hacienda Hotel*, female employee's in the housekeeping department were repeatedly subjected to discriminatory employment practices during 1982 and 1983. The conduct ranged from sexually offensive remarks, failure to accommodate their religious beliefs and termination from their jobs when they became pregnant. The executive housekeeper admitted that he terminated everyone pursuant to his policy of terminating pregnant women. *Hacienda Hotel*, 1508. Clearly this behavior meets the standard of discriminatory conduct. There was no *claim that she lost overtime.*

Second, GM Powertrain offered unrefuted evidence of its business reasons for transferring Petitioner from the prototype department. GM Powertrain realized that the prototype torque clutch converters would not reach its expected production forecast. Management needed to transfer one prototype tool and die employee to the shop.

Petitioner agreed that she had less seniority than any of the other prototype tool and die employees and that she would be the first to return to the shop tool and die.

Third, Petitioner could not establish that there was a causal connection between her transfer to shop tool and die and her complaint of sexual harassment.

Petitioner admitted that she did not consider herself to be subjected to sexual harassment until the "PMS" password was placed on the computer. (Exhibit 1, Plaintiff's dep. at p. 44). It is undisputed that petitioner did not complain about the password until January 24, 1996. The decision to transfer her from prototype tool and die to shop tool and die was made January 23,1996. (Exhibits 12 and 14). Thusly, Petitioner could not have been transferred in retaliation because the decision was made before she made any complaint of sexual harassment.

Petitioner misstated the Court's holding in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3. Petitioner presumably cited this case to support her argument that the Court of Appeals should have considered the issue her claim that overtime was denied to her when she was temporarily transferred back to prototype. The Court of Appeals did not consider this allegation because Petitioner did not raise it until she filed an affidavit in support of her opposition to the motion for summary judgment. At the time, all discovery in the case had ended.

In *Brown*, however, the Court of Appeals was addressing a procedural issue regarding the tolling of the statute of limitations. Petitioner sought to introduce factual claims without the employer having the opportunity to

investigate this specific claim, to cross examine her or to offer rebuttal evidence. Therefore the district court and Court of Appeals were correct in not considering her allegation for that period.

CONCLUSION

For the foregoing reasons Respondent, GM Powertrain, prays this Court deny this petition for writ of certiorari.

Respectfully submitted,

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